No. 85-562

Supreme Court, U.S.
FILED
OCT 11 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SPIKA, CHARLES KUEHNE, STEVEN POKORNY, RICHARD ENGEL, RICHARD SHAFER, DANE CUNY, FRANK PARTIPILO, RAYMOND CLARK, MARK GOUTY, PAUL NOLAN, ORIN WALKER, RICH MONTALTO, DANIEL NEUSTADT, DANIEL KELLY, BARBARA DURNIL, RICHARD STICKA, JOSE PEREZ, JAMES GLENNON, CHARLES GUTSMIEDL, Patrolmen of the Village of Lombard, Illinois, and **FRANK J. ESPOSITO, GLENN Q. FOSTER, SCOTT M. RYAN, MICHAEL J. TORRENCE, FRANK D. ANGILERI, ROBERT W. SISLEY, PETER J. DAVIS III, DANIEL A. MUSACCHIO, WILLIAM E. COLEY, JAMES A. PLUNKET, KWAPISZ, JAMES M. BARRON, GREGORY J. ORLANDO, MICHAEL J. DIRIENZO, RICHARD A. WARREN, DONALD V. HANLON,** Firefighters of the Village of Lombard, Illinois,

Petitioners,

vs.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL APPENDIX

STANLEY H. JAKALA
3219 Maple Avenue
Berwyn, Illinois 60402
(312) 788-5733
Attorney for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

TABLE OF CONTENTS

	PAGE
Report and Recommendation of Magistrate Carl B. Susman, November 29, 1983	1
Minute Order of the United States District Court for the Northern District of Illinois, Eastern Division, December 23, 1983	8
Judgment Order of the United States District Court for the Northern District of Illinois, Eastern Division, December 23, 1983	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SPIKA, CHARLES KUEHNE, STEVEN POKORNY, RICHARD ENGEL, RICHARD SHAFER, DANE CUNY, FRANK PARTIPILO, RAYMOND CLARK, MARK GOUTY, PAUL NOLAN, ORIN WALKER, RICH MONTALTO, DANIEL NEUSTADT, DANIEL KELLY, BARBARA DURNIL, RICHARD STICKA, JOSE PEREZ, JAMES GLENNON, CHARLES GUTSMIEDL, Patrolmen of the Village of Lombard, Illinois, and **FRANK J. ESPOSITO, GLENN Q. FOSTER, SCOTT M. RYAN, MICHAEL J. TORRENCE, FRANK D. ANGILERI, ROBERT W. SISLEY, PETER J. DAVIS III, DANIEL A. MUSACCHIO, WILLIAM E. COLEY, JAMES A. PLUNKET, KWAPISZ, JAMES M. BARRON, GREGORY J. ORLANDO, MICHAEL J. DIRIENZO, RICHARD A. WARREN, DONALD V. HANLON,** Firefighters of the Village of Lombard, Illinois,

Petitioners,

VS.

THE VILLAGE OF LOMBARD, ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

---

SUPPLEMENTAL APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD SPIKA, et al.,

Plaintiffs,

vs.

THE VILLAGE OF LOMBARD,

Defendant.

REPORT AND RECOMMENDATION OF MAGISTRATE CARL B. SUSSMAN

TO THE HONORABLE NICHOLAS J. BUA, one of the Judges of the United States District Court for the Northern District of Illinois.

This case is an action brought pursuant to 42 U.S.C. Section 1983 by certain patrolmen and firefighters of the Village of Lombard, wherein they seek both monetary damages and declaratory relief against the Village as the sole defendant for alleged violations of their constitutional rights. Subject matter jurisdiction with respect to the cause properly lies under 28 U.S.C. Sections 1343, 1331, 2201 and 2202. Defendant had filed a motion to dismiss Plaintiffs' complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

STATEMENT OF FACTS

The controversy in this matter revolves around Ordinance No. 2533 passed by the Board of Trustees of the Village of Lombard, to become effective on June 1, 1982, which provides for step-up salary increases to the Lombard police and firefighter forces. The Plaintiffs allege that the Defendant Village's custom and practice of fifteen years of paying step-up increases created an implied con-

tract which became an explicit contract recognizing that custom and practice by the passage of said ordinance. Plaintiffs therefore contend that the failure of the Village to pay the increases as provided constitutes a violation of Plaintiffs' liberty interest and property right protectable under the due process clause of the Fourteenth Amendment to the United States Constitution.

DISCUSSION

It is a well accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957). Although the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts which are the basis of his claim, *Id.* at 47, a plaintiff, in order to state a claim upon which relief can be granted under 42 U.S.C. Section 1983, must make some specific allegations of fact indicating the deprivation of civil rights, rather than stating simple conclusions. *Koch v. Yunich*, 533 F.2d 80 (2d Cir. 1976); *Powell v. Jervis*, 460 F.2d 551 (2d Cir. 1972); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir.), *cert. denied*, 400 U.S. 846 (1970).

To satisfy the prerequisite for an assertion of the constitutional requirements of due process, a party must implicate a protected interest in either life, liberty or property. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 1701, 33 L.Ed.2d 548 (1972). Thus, in order to invoke either a procedural or substantive due process safeguard, Plaintiff must be able to establish the existence of a protected liberty interest or property right encompassed by the due process clause. *Board of Regents v. Roth*, *supra*; *Perry v. Sindermann*, 408 U.S. 593 (1972); *Webster v. Redmond*, 599 F.2d 793 (7th Cir. 1979).

In the case at bar, in support of their claim of deprivation of a liberty interest, Plaintiffs merely allege that the ordinance in question created a liberty interest, namely

the fundamental liberty interest to engage in the common occupation of life, such as police work. However, there is no suggestion that the Defendant, in failing to pay for the step-up increases, imposed on Plaintiffs a stigma or other disability that foreclosed their freedom to take advantage of other employment opportunities, including police work. *See Board of Regents v. Roth, supra*; *Bishop v. Wood*, 426 U.S. 341 (1976). Had they done so, this would be a different case. For "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

The mere allegation that Plaintiffs did not receive the step-up salary increases as provided in the ordinance can hardly be sustained as a loss of a liberty interest within the meaning of the due process clause. The Supreme Court in *Board of Regents v. Roth, supra*, emphasized that it would "stretch the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Id.*, at 575. This same conclusion would apply if it is suggested that a public employee is deprived of "liberty" when he does not receive a certain salary or wage rate, especially in light of the fact that a salary, which is fixed by a municipal body, is a benefit that can be either diminished or increased at the will of the legislative body. *Koch v. Yunich, supra.*

Thus, absent some showing that Plaintiffs' standing and association in their community has been damaged or that Plaintiffs' reputation, honor or integrity has been impugned as a result of the Defendant's action, it is this court's opinion that Plaintiffs have failed to state a claim upon which relief can be granted on the basis of any violation of a protected liberty interest. *See, Bishop v. Wood, supra*, and *Perry v. Sindermann, supra.*

On the other hand, for due process purposes, to have a cognizable property interest in governmental benefits, it is not enough that the claimant has a demonstrated

need for such benefits, rather he must have a legitimate claim of entitlement to them. *Board of Regents v. Roth, supra*; *Confederation of Police v. City of Chicago*, 481 F. Supp. 566 (N.D. Ill. 1980); *Anderson v. City of Northlake*, 500 F.Supp. 863 (N.D. Ill. 1980). Such an entitlement may stem from a state law conferring the benefit in issue, or from rules or mutually explicit understandings which would support the claim presented. *Confederation of Police v. City of Chicago, supra*, at 569. Regarding this question, the Plaintiffs claim that the ordinance and the custom and practice of fifteen years embodied in the passage of said ordinance are sufficient support for a claim of entitlement. The sufficiency of this contention, however, must be decided by reference to state law. *Board of Regents v. Roth, supra*; *Bishop v. Wood, supra.*

Under Illinois law, it is well settled that public employees do not have a property interest in the continued application of any specific rate or method of compensation. *Chicago Patrolmen's Association v. City of Chicago*, 56 Ill.2d 503, 309 N.E.2d 3 (1974); *Gathemann v. City of Chicago*, 263 Ill. 292, 104 N.E. 1085 (1914). Therefore, under Illinois law, the failure of the Defendant to pay for the step-up increases did not deprive the Plaintiffs of any property rights arising from the ordinance in question.

The Plaintiffs, though, also argue that, through the Defendant's act of enacting the ordinance, a contractual relationship, either expressed or implied, was established between the parties. Such a relationship, they contend, created for the officers a protected property interest in the receipt of the contractually-provided salary increases. In determining whether a law tenders a contract to a citizen, it is of first importance to examine the language of the statute. *Anderson v. City of Northlake, supra* at 866; *see also In Re Application of Skidmore*, 75 Ill.2d 33, 387 N.E.2d 290 (1979). If it provides for the execution of a written contract on behalf of the state or municipal body, the case for a binding obligation is clear. *Hall v. Wisconsin*, 103 U.S. 5 (1880). On the other hand, a legislative act which merely fixes salaries of officers does not create

any contract in their favor and the compensation named may be altered at the will of the legislature. *Dodge v. Board of Education*, 302 U.S. 74 (1937). The presumption, according to the United States Supreme Court is that "such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* at 79. The same conclusion was reached by the Illinois Supreme Court when it stated:

> Ordinances fixing salaries are not contracts with officers for the full term of their office. (Citation omitted) . . . The salaries of such officers may be reduced or otherwise regulated, as the municipality may decide. . . . The salary created by (the ordinance) is not property. The right of compensation grows out of the rendition of services and not out of any contractual relation." (Citation omitted).

Gathemann v. City of Chicago, *supra* at 295, 104 N.E. at 1087. From the above, it must be concluded that, because of the nature of the ordinance, no valid contract ever existed between the parties. As to plaintiffs' implied contractual obligations theory, the contention seems to be that, as a result of the officers' reliance upon ordinance No. 2533, which embodied the defendant's custom and practice of fifteen years to pay for step-up salary increases, an implied contractual relationship was created. There are many difficulties with this contention. First of all, under the principles set forth in *Dodge* and *Gathemann*, the ordinance in question did not confer upon the officers any state-law-created property right; therefore, any reliance upon said ordinance is unwarranted. Furthermore, it should be noted that ordinance No. 2533 was not an appropriation ordinance. As such, it cannot be given effect unless there was a prior appropriation. The critical legal consideration is found in Section 8-1-7 of the Illinois Municipal Code, which provides in pertinent part:

> "No contract shall be made by the corporate authorities, or by any committee or member thereof, and no expense shall be incurred by any of the officers or departments of any municipality, whether the object of the expenditure has been ordered by the corporate authorities or not, unless an appropriation has been previously made concurring that contract or expense. Any contract made, or any expense otherwise incurred, in violation of the provisions of this section shall be null and void as to the municipality, and no money belonging thereto shall be paid on account thereof."

Ill.Rev.Stat. 1971, Ch. 24, par. 8-1-7.

That an appropriation ordinance was subsequently passed and alleged by the plaintiffs to encompass the step-up salary increases as provided by ordinance No. 2533, cannot operate to validate any contractual obligations created by ordinance No. 2533. The Illinois Supreme Court, in interpreting Section 8-1-7, had expressly held that:

> Under Section 8-1-7 of the Municipal Code, any contract made without a *prior* appropriation is null and void. (Emphasis added).

Chicago Patrolmen's Association v. City of Chicago, supra at 505. The requirement is thus plain and clear; since the appropriation ordinance in question was passed nearly two months after the passage of ordinance No. 2533, no contract, either expressed or implied, can be deemed valid.

Consequently, because Plaintiffs can prove under their Complaint no set of facts which would entitle them to relief and that their constitutional claims are wholly insubstantial, Plaintiffs' Second Amended Complaint should be dismissed.

CONCLUSION

For the aforementioned reasons, it is respectfully recommended that the District Court dismiss Plaintiffs' Second Amended Complaint for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Counsel are given ten (10) days from the date hereof, unless otherwise extended by the court, to file exceptions to said Report and Recommendation with the Honorable Nicholas J. Bua.

Respectfully submitted,

/s/ Carl B. Sussman
United States Magistrate

Dated: November 29, 1983

cc:(w/o encls.)

Stanley H. Jakala
3219 Maple Avenue
Berwyn, Illinois 60402
(Attorney for Plaintiffs)

Sara Hansen Sotos
JUDGE & KNIGHT, LTD.
422 North Northwest Highway
Suite 200
Park Ridge, Illinois 60068
(Attorney for Defendant)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge,
Honorable Nicholas J. Bua

Cause No. 82 C 7557 Date December 23, 1983

Title of Cause: Richard Spika v. Village of Lombard

* * * * *

ORDER

This Court adopts the report and recommendation of Magistrate Sussman dated November 29, 1983. The second amended complaint is dismissed for failure to state a claim upon which relief can be granted.

/s/ Bua, J.

JUDGMENT IN A CIVIL CASE

United States District Court	NORTHERN DIST. OF ILL., EASTERN DIV.
RICHARD SPIKA, et al.	No. 82 C 7557
v.	
VILLAGE OF LOMBARD	Judge NICHOLAS J. BUA

* * * * *

X *Decision by Court.* This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

plaintiffs take nothing and action is dismissed for failure to state a claim upon which relief can be granted.

H. Stuart Cunningham
Clerk

/s/ Frances D'Andrea
Deputy Clerk

Date Dec. 23, 1983